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Henry S. Barker
University of Kentucky

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No. 1

"THE DRED SCOTT CASE."

By HENRY S. BARKER, President State University.

It is our purpose in this article to examine the celebrated case of Scott vs. Sanford (19 Howard 393), commonly known as "The Dred Scott case." We are impelled to this not only because of the magnitude and interest of the principles involved at the time, but because the case marks a forward step in that great discontent, which is rapidly growing up among men, with the decisions of the courts in what are called political cases.

The final result of this case shows the impotence of courts to stay the onward march of a moral principle by a judicial mandate. Never was a greater moral question presented for adjudication to a court than was presented by the record in this case to the Supreme Court of the United States. The real question was the right of slavery to extend itself by process of law over all the territories of the United States—the apparent question on the record was the right of an humble negro to his freedom.

From the earliest moment in the history of the Union, the question of slavery was a serious menace to its permanency. Originally it existed in all the colonies and afterwards in most of the states, but the trend of civilization was against it, and where the institution was least profitable, the moral sentiment in favor of liberty grew proportionately. At the formation of the Constitution (1787), the right of one man to own his fellowman was practically denied in all of the northern states and the sentiment in favor of universal freedom was strong among the most intellectual citizens of the South, chief among whom were Thomas Jefferson and George Mason, of Virginia. In 1793, the invention of the saw gin by Eli Whitney, which enabled one negro to clean more than a thousand pounds of cotton in a day, so enhanced the value of slaves that the commercial interest of the South was arrayed against freedom and in favor of negro slavery. The result of all this was that the Union was divided into sections—North and South—on the question of slavery. The moral sentiment in favor of freedom grew so rapidly in the North that it early became apparent that the interest of slavery must be made to grow also or the institution would soon be submerged beneath the waves of the

great moral revolt rising against it. To this end the statesmen of the South concentrated their attention on the acquisition of new slave territory. Florida, Louisiana, Texas and California were acquired, but nevertheless it was obvious that unless something was done to still further extend slave territory, the dominance of the South in the policy of the nation was doomed.

In 1820, when Missouri (a part of the Louisiana purchase) applied for admission as a slave state, Congress refused her petition and the country was brought face to face with the long-delayed death struggle between the forces of freedom and the forces of slavery in such alarming fashion that the hearts of those who loved the Union almost sank in despair; Thomas Jefferson said the sudden apparition startled him "like a fire bell in the night." After a somewhat prolonged political struggle a compromise was agreed upon and Missouri was admitted as a slave state, with the proviso that in all other territory north of the line 36° 30' slavery should be prohibited.

In 1787, while the convention at Philadelphia was forming the Constitution, the Congress of the expiring Confederation was adopting an ordinance organizing the Northwest Territory, a vast boundary of land north of the Ohio and east of the Mississippi, now comprising the states of Michigan, Wisconsin, Illinois, Indiana and Ohio. By section 6 of this ordinance slavery was prohibited in the territory. All the Northwest Territory was finally admitted into the Union as states with slavery prohibited in their constitutions. California on the extreme west was a free state and it really seemed that the tree of slavery was at last girdled round and must, as its enemies hoped and its friends feared, soon die.

In 1854, the pro-slavery members of Congress under the leadership of Stephen A. Douglass, passed a bill repealing the Missouri Compromise. The first effect of the repeal of the measure seemed highly satisfactory to the men of the South, but in the North it was met with a roar of indignation, and in the succeeding congressional elections the Democratic majority of eighty-four was entirely wiped out and the party left in a minority of seventy-five.

It was not difficult to see that the opponents of slavery extension by concert of action could immediately re-enact the Missouri Compromise, so far as the House was concerned, and that in a few years they would doubtless control the Senate. If now, while the Supreme Court was Democratic, a case could be brought before it which would enable the judges, or a majority of them, to hold the Missouri Compromise unconstitutional, then all would be well and slavery would be established in the territories by judgment of the court. At this juncture (1855) it was discovered that there was pending in a State Court of Missouri a case which if properly prepared could go to the Supreme Court of the United States, and which would present the very question which the pro-slavery party desired to have adjudicated—the constitutionality of the Missouri Compromise. The facts of the case are as follows:

In 1834 Dr. Emerson, an army surgeon, had taken his slave, Dred Scott, first to Illinois where slavery was prohibited by law, then into that part of the territory of Wisconsin which is now the

State of Minnesota and a part of the Louisiana purchase within the prohibition of slavery by the Missouri Compromise. Subsequently he returned with his slave to Missouri. Dr. Emerson afterwards died leaving a will which appointed the testator's brother-in-law, John F. A. Sanford, executor, and devising his property to his wife; Mrs. Emerson afterwards married Dr. Calvin C. Chaffee, a member of Congress from Massachusetts. Her brother John F. A. Sanford resided in the State of New York.

Under the influence of local attorneys, Dred Scott had instituted an ordinary action in the State Court of Missouri against his mistress claiming damages for a supposititious assault and battery and for unlawfully depriving him of his liberty. Upon the issue formed in this case the trial court held that the effect of taking the plaintiff into a territory where slavery was prohibited by law was to make him a free man and so his status remained after his return to Missouri, and judgment was entered accordingly; this judgment on appeal was reversed by the Court of last resort of Missouri and the case remanded for further proceedings consistent with the judgment on appeal; while it was in this condition, the attention of men high in authority was directed to it and it was recognized as being the needed case for the political exigency of the occasion. The original attorneys were relegated to the rear and Scott's interests were placed in the hands of very distinguished Counsel, Montgomery Blair and George Ticknor Curtis, while Sanford's were entrusted to Senator Henry S. Geyer, the leader of the St. Louis bar, and Reverdy Johnson, whose reputation as a lawyer was coextensive with the whole country. The case in the State Court was abandoned or, at least, ignored and a new action instituted in the United States Circuit Court for the district of Missouri, where a judgment adverse to the plaintiff was rendered and an appeal to the Supreme Court of the United States was at once prayed.

We are not stating the facts of this celebrated case with minute particularity nor with absolute verbal accuracy but only in such outline as will illustrate and explain the opinion of the Court.

The record on appeal presented several questions, some of them more or less technical. These we shall not notice but limit our examination to those in which the public at large were interested. The first of the public questions presented was whether the plaintiff was a citizen of the State of Missouri within the meaning of the Constitution, which gives citizens of different States the right to sue in the Federal Courts (Art. 3, Sec. 2, U. S. Const.) If Scott was not a citizen of Missouri he had no right to institute his action in the Federal Court and, therefore, it was without jurisdiction to entertain it. The allegation on this point was that Scott was a negro of African descent, his parents having been of pure African blood, and brought to the United States as slaves. The question was thus stated and answered by the Court:

"The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the

negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States? * * * *

"The Court thinks the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its Courts."

The court also decided that, assuming the principle to be true, that if a slave was carried by his master into a state wherein slavery was prohibited, the slave would be free under the laws of that state, yet, if the slave returned with the master to a slave state, in an action for his freedom his status was to be decided by the law of the latter state; and therefore although Dred Scott had been carried by his master into the State of Illinois where slavery was prohibited by the Constitution, still, as he had returned with his master to Missouri where slavery was permitted by law, his right to freedom was to be determined by the law of Missouri, not by the law of Illinois.

The case might well have been rested upon this proposition, and if this had been done there would have been little or no excitement or comment about it because the question would then have simply been the personal rights of the plaintiff, Dred Scott, and would have involved no great political principles; and this at one stage of the procedure had been determined upon, and the case assigned to Mr. Justice Nelson to write the opinion, resting it upon the fact that Dred had returned with his master to Missouri after the visit to Illinois, and therefore, his right to freedom must be determined by the law of Missouri. But the court was persuaded to extend the scope of the opinion so as to include the right of a negro to be made a citizen and also to include the validity of the Missouri Compromise; and the Chief Justice, writing for the court, held in the opinion that the Missouri Compromise was invalid. In so doing, it was said that slaves were property in no way different from other kinds of property; and as the territories belonged to all the people of the United States, each citizen had a right to take his property into the territory without let or hindrance by the Congress of the United States.

After setting forth the views of the court at great length and the reasons upon which they were based, it was said:

"Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried

into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident."

This opinion was received by the South with great joy as settling forever the question of the right of a citizen to carry his slaves at will into any part of the territory of the United States. On the contrary, it incurred the most severe condemnation in the North, which recognized in it the fact that slavery was now crystallized by law in all of the territories of the country; and that no public sentiment against it, no consideration of its immorality could stop its onward march. Everywhere throughout the North, public speakers denounced it in unmeasured terms as a purely political opinion, having no sound basis in reason or morality, and promulgated purely for the exigencies of a political party. Its soundness was one of the central points of the great debate between Mr. Douglass and Mr. Lincoln in their race for the United States Senate, and Lincoln criticised it without mercy. It was, however, believed by many that the people at large would acquiesce in the findings of the court. A profound respect for the opinion of the judiciary has ever been the attitude of the Anglo-Saxon race. Indeed, this respect constitutes the keystone of Anglo-Saxon civilization; and it was therefore not without reason that many people believed that the opinion of the court in this case would be accepted, and that the great question involved in it—the right to extend slavery throughout the territories—was forever settled adversely to freedom and in favor of slavery.

In the North, it was claimed that the court had gone beyond its jurisdiction in passing upon the validity of the Missouri Compromise, because having held that Dred Scott was not a citizen of Missouri and not entitled to institute his action in a Federal court, the United States Circuit Court did not have jurisdiction of the case and that any further inquiry into the case was *coram non judice*. The Chief Justice was mercilessly criticised for going beyond the question of jurisdiction in order to hold invalid an act of Congress, which constituted the basis of the settlement of a great moral question. In this, however, they overlooked the fact that Chief Justice Marshall did the same thing in the case of *Marbury against Madison* (1 Cranch 137), and the opinion in the last case has been praised as much as any other judicial utterance of the great Chief Justice. It is also said that the court was unduly influenced by the pressure of public sentiment, and in this the critics may be right for, after all, judges are but men and subject to the same kind of influences as other men.

As a rule, a judge does not control his political prejudices; but these, lying as they do at the very foundation of his mental nature, influence him, and it may be admitted that Chief Justice Taney and his associates were insensibly influenced by the political situation and by the hopes and expectations of the statesmen and politicians with whom they were surrounded. But if this be true, they were not in a different attitude from that of Chief Justice Marshall and his associates in the great Dartmouth College case (IV Wheaton 518). When that case was argued at the bar, it was well known that five of the seven Justices were adverse to the College; and the court having

adjourned for the summer without reaching a conclusion, there was a deliberate conspiracy on the part of the friends of the college to influence the court.

Mr. Henry Cabot Lodge in his life of Daniel Webster, who was chief counsel for Dartmouth College, gives a most interesting account of how the political side of that great case was managed. With great glee he recites how Webster played upon the political passions of the Chief Justice in order to obtain his sympathy. He states that Mr. Webster was sure of the sympathy of the Chief Justice and Mr. Justice Washington, and he was equally sure of the opposition of the other five. After speaking at length on the subject of Mr. Webster's management of the case, Mr. Lodge says:

"But this management now entered on a much higher stage, where it was destined to win victory, and exhibited in a high degree tact and knowledge of men. Mr. Webster was fully aware that he could rely, in any aspect of the case, upon the sympathy of Marshall and Washington. He was equally certain of the unyielding opposition of Duvall and Todd; the other three judges, Johnson, Livingston and Story, were known to be adverse to the college, but were possible converts. The first point was to increase the sympathy of the Chief Justice to an eager and even passionate support. Mr. Webster knew the chord to strike, and he touched it with a master hand."

Speaking of the status of the case at the conclusion of the argument, the author says:

"The fact probably was that Marshall found the judges five to two against the college, and that the task of bringing them into line was not a light one. In this undertaking, however, he was powerfully aided by the counsel and all the friends of the college. The old board of trustees had already paid much attention to public opinion. The press was largely Federalist, and, under the pressure of what was made a party question, they had espoused warmly the cause of the college. Letters and essays had appeared, and pamphlets had been circulated, together with the arguments of the counsel at Exeter. This work was pushed with increased eagerness after the argument at Washington, and the object now was to create about the three doubtful judges an atmosphere of public opinion which should imperceptibly bring them over to the college. Johnson, Livingston and Story were all men who would have started at the barest suspicion of outside influence even in the most legitimate form of argument, which was all that was ever thought of or attempted. This made the task of the trustees very delicate and difficult in developing a public sentiment which should sway the judges without their being aware of it. The printed arguments of Mason, Smith and Webster were carefully sent to certain of the judges, but not to all. All documents of a similar character found their way to the same quarters. The leading Federalists were aroused everywhere,

so that the judges might be made to feel their opinion. With Story, as a New England man, a Democrat by circumstances, a Federalist by nature, there was but little difficulty. A thorough review of the case, joined with Mr. Webster's argument, caused him soon to change his first impression. To reach Livingston and Johnson was not so easy, for they were out of New England, and it was necessary to go a long way round to get at them. The great legal upholder of Federalism in New York was Chancellor Kent. His first impression, like that of Story, was decidedly against the college, but after much effort on the part of the trustees and their able allies, Kent was converted, partly through his reason, partly through his Federalism, and then his powers of persuasion and his great influence on opinion came to bear very directly on Livingston, more remotely on Johnson. The whole business was managed like a quiet, decorous political campaign."

So, if it be admitted, as said before, that political pressure was brought to bear upon the court in the Dred Scott case, much more so was that true of the opinion in the Dartmouth College case, for which Chief Justice Marshall has been praised by the legal world ever since it was written, and if it be true, as said before, that Tawny went beyond the question of jurisdiction and decided the merits of the case without having jurisdiction, he had a precedent from Marshall to follow in *Marbury vs. Madison* supra. Perhaps in no case ever decided was there so much vilification of the court as in the one under discussion. Among other things it was said, and has been reiterated time and time again, that Chief Justice Tawny held that a black man has no rights that a white man is bound to respect. Nothing is further from the truth than this. The negro race had no more sincere sympathizer than Chief Justice Tawny, who was an emancipationist who freed all the negroes he inherited except the old ones who were unable to care for themselves, and these he tenderly supported until death; and what he said was not his own opinion about the question of slavery but what he thought the public opinion was at the time of the Declaration of Independence. Here is the exact language used:

"It is difficult to realize at this day the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

"They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."

But while the foregoing language does not support the political myth as to what Chief Justice Tawny said about negroes not having any rights that the white man was bound to respect, it does show that he allowed his political feelings to express themselves at the expense of the truth of history. The great part of the civilized world did not at the time of the Declaration of Independence and the formation of the Constitution hold the views respecting slavery which the Chief Justice expressed in the opinion; but, on the contrary, a great part of the people in the United States, at those times, both of the North and the South, viewed slavery as both inexpedient and morally wrong.

In drafting the Declaration of Independence, Thomas Jefferson used the severest language in regard to slavery in arraigning George III for his sins against America. It is true that this language as reported was stricken out by Congress, but this was done only to please Georgia and South Carolina. The representatives of the great majority of the states agreed with Thomas Jefferson and the committee on the subject; but, at any rate, these were the views of one of the greatest statesmen of the South. The language referred to is as follows:

"He (George the Third) has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, capturing and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of infidel powers, is the warfare of a Christian king of Great Britain. Determined to keep open market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce. And that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them: thus paying former crimes committed against the liberties of one people with crimes which he urges them to commit against the lives of another."

While the Constitutional Convention was in session, the Congress of the expiring Confederation inserted into the ordinance establishing the Northwest Territory, Section 6, which in the most explicit terms prohibits slavery in all that vast territory.

Surely it cannot be truthfully said in the light of these facts that, at the time of the Declaration of Independence and the formation of the Constitution, slavery was viewed by the civilized world as being altogether right and expedient, and that negroes had no rights which the white man was bound to respect.

We believe that the learned Chief Justice was swayed by his political prejudices far beyond the true facts as to what the people at large thought of slavery at the time of the promulgation of the

Declaration of Independence and the formation of the Constitution. But we also believe that no greater or purer court ever sat on the woolsack than that which was constituted by Chief Justice Tawny and his associate justices.

Chief Justice Tawny was a more learned lawyer than Chief Justice Marshall, and he was altogether as upright and pure a magistrate as was the great Virginian; and while we disagree with him in the conclusion that he reached, we believe also that the opinion handed down by the court was dictated by the purest sentiment of justice under the law as the Court understood it.

Tawny and his associates in the Dred Scott case were carried away by their political prejudices just as Marshall and his associates were carried away in the Dartmouth College case. It took a great war to undo the moral wrong of the principle enunciated in the Dred Scott case, and every state in the Union has had to pass acts reserving the right of repeal and alteration in charters granted to corporations in order to escape the blighting effects of the principle enunciated in the Dartmouth College case. The public at large has much misinformation with regard to the case under discussion. Dred Scott is viewed as a poor, persecuted negro man, fighting for his own liberty and that of his wife and children. The Chief Justice is thought of as a pro-slavery Democrat of the narrowest type, with no sympathy for the colored man and believing that he had no rights that the white man was bound to respect. The legal master of Dred Scott is supposed to have been a slave driver who had cruelly beaten his slave, and thus forced him to go into the courts for that relief that he could not find in the mercy of the master.

As a matter of fact, the Chief Justice, as said above was called an Emancipationist because he lived in the South. If he had been a northern man, he would have been called an Abolitionist. Dred Scott's mistress, at the time this suit was instituted, was Mrs. Chaffee, and her husband was an Abolitionist member of Congress from the State of Massachusetts. The trustee, John F. A. Sanford, brother of Mrs. Chaffee, was an Abolitionist, who resided in the State of New York. Dred Scott was only a slave in name. In good truth, he had been as free as the winds for years before the suit was brought. His legal masters were anxiously desirous of finding a way to emancipate him, but because they were non-residents, there was much difficulty in doing so under the law of Missouri. He was living at free quarters in the family of a former master, Mr. Taylor Blow, of St. Louis, and after the suit was ended and his petition had been denied, his legal masters conveyed him to Taylor Blow for the purpose of having him set free, and this was done.

Dred Scott and his trustee master, John F. A. Sanford, both died in 1858, just before the curtain of that great Civil War, which the case did so much to hurry, was rolled up; and after this dreadful war was over, slavery was dead, secession was dead, and the disunited parts of our empire republic, north and south, had been welded by the hammering and flames of war into a more perfect union "an indestructible Union composed of indestructible states."